

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

The State of New Hampshire

v.

Paul Zinck

Docket No. 03-S-1000-1024; 04-S-2393-2444

ORDER ON STATE'S MOTION TO RECONSIDER

The defendant, Paul Zinck, is charged with numerous counts of Possession of Child Pornography, contrary to RSA 649-A:3, I(e) (Supp. 2004). On January 3, 2005, the court granted the defendant's most recently filed Motion to Suppress in which he alleged, for the first time, that the State failed to conduct a search of his computer and related equipment in a timely fashion. Specifically, the defendant argued that the 18-month delay between the time the warrant was signed and the State's first efforts to search his computer violated both the State and Federal constitutional protections against unreasonable searches. The State now moves this court to reconsider the order. For the reasons stated here, the motion is DENIED.

As a preliminary matter, the State argues that this court should reconsider its January 3, 2005 order granting the defendant's Motion to Suppress because it is in direct conflict with Judge Abramson's October 31, 2003 order, denying a previously filed Motion to Suppress. The court disagrees with the State's interpretation of the two orders. First, Judge Abramson's order considered whether the search violated the defendant's right to privacy, whether the police

had sufficient reasonable suspicion to approach the defendant and whether the defendant's consent to search the computer was freely given. Judge Abramson did not address the reasonableness of the delay in conducting the actual search; an issue the defendant raised for the first time in November 2004.

Moreover, contrary to the State's argument, this court did not find that the defendant's consent was invalid. Rather, it determined that when a search is conducted either pursuant to a defendant's valid consent or to a valid search warrant, it must be performed reasonably.¹ In addition, this court reasoned that once the police obtained a warrant it would be unlikely for a person in the defendant's position to have believed his subsequent withdrawal of the consent would affect the search. Thus, in reliance on United States v. Brunette, 76 F.Supp.2d 30 (D. Me. 1999), this court concluded that an 18-month delay in conducting a search of the defendant's computer was unreasonable.

The State now presents new authority in order to support its position that the search, though unreasonably delayed, was nonetheless constitutional. Specifically, the State relies on United States v. Hernandez, 183 F.Supp.2d 468 (D. P.R. 2002), and United States v. Habershaw, 2001 WL 1867803 (D. Mass.), for the proposition that computer searches are not subject to completion within the same mandatory time frames as other types of searches. Upon review, however, the court finds both the Hernandez and Habershaw cases to be distinguishable from the case here. The searches in each of those cases,

¹ It is well settled law that the right of every citizen to be secure against unreasonable searches and seizures is guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and by Part I, Art.19 of the New Hampshire Constitution.

although completed outside the time limits prescribed by the warrants, were not delayed such that the defendants' constitutional protection against unreasonable searches was violated.

In Hernandez, the defendant was indicted for possession of child pornography and moved to suppress evidence found in his computer. Specifically, the defendant claimed that government officials had failed to complete the search of his computer within the time designated by the warrant. Although many of the images in that case were recovered before the warrant's time limit had expired, and were therefore not untimely, the police did not complete their search of the twenty-six floppy disks obtained from the defendant's premises until approximately one month after the return date had expired on the warrant. The Hernandez Court determined it was reasonable for the Government to take approximately one month's time to inspect the images on the disks, despite the nine-day time period prescribed by the warrant. In so finding, the Court stated that a search of computer data requires more preparation than an ordinary search and a greater degree of care in the execution of the warrant. In addition, the Court found that the volume of information necessitated a longer period of time for the search to be completed. Thus, because the search had been ongoing and many of the images had been recovered before the expiration of the warrant, the Court concluded the search was not unreasonable.

Likewise, the United States District Court for the District of Massachusetts determined in Habershaw that a supplementary search on a computer, allegedly

conducted by police four days after the return date required by the warrant, did not render the search unconstitutionally unreasonable. The Habershaw Court concluded that the search was reasonable because the original search on the computer was completed within the ten-day time period mandated by the warrant, and that a further search, conducted four days later, was not violative of the defendant's constitutional rights. In addition, the Court noted that the defendant offered no evidence in that case to support his claims that a search had taken place outside the ten-day time frame.

In contrast to Hernandez and Habershaw, the State concedes in the present case that it did not even initiate a search of the computer's contents until 18 months after taking possession of the computer. Thus, this is not a case where the length of time after the warrant's expiration is brief and justifiable due to the time constraints of a search initiated within the warrant's time frame. Nor is this a case where the volume of material necessitated an excessive amount of time to complete the search. Indeed, the State concedes that once the search was initiated it took just two weeks to complete. In this instance, the State has offered no justifiable reason for waiting approximately a year and one half to begin a search of the defendant's computer. Though the State claims the Forensic Lab was suffering a backlog and only one technician was available to conduct the search, the State and not the defendant should bear the burden of such resource deficiencies. In fact, a State Police Detective, and not the lab technician ultimately conducted the search in this case.

As this court noted in its original order, “in some circumstances, some delay in processing evidence may excuse tardy searches.” The facts of this case, however, do not present such a situation. Unlike the brief delays in Hernandez and Habershaw, which were justified by the difficulty in conducting the searches, the court finds the delay in this case was clearly unreasonable and therefore violated the defendant’s constitutional rights.

Additionally, the court notes that the Hernandez opinion relies upon the reasoning of Commonwealth v. Ellis, 1999 WL 815818 (Mass. Super.). In Ellis, a Massachusetts Superior Court concluded that even if a delay in executing a search warrant is found to be unreasonable, the evidence should only be suppressed in the event the defendant can demonstrate a legal prejudice as a result of the delay. Relying upon this rationale, the Hernandez Court determined that the examination of items in a computer after the expiration of the warrant’s time frame does not require suppression of the evidence. A close review of the Ellis case, however, reveals that the court misconstrued Commonwealth v. Cromer, 365 Mass. 519 (1974), in reaching its conclusion.

In Cromer, the Massachusetts Supreme Judicial Court discussed the time limits within which search warrants must be executed and returned to the court. Specifically, the question before the Court was whether a search initiated seven days after the issuance of the warrant, although returned within the mandatory time frame prescribed by the warrant, could still be found unreasonable because of its failure to comply with “immediacy” requirements.

The following relevant facts of the Cromer case are helpful. On November 30, 1971, the Boston Police Department obtained a warrant to search a designated dwelling in Boston. The warrant was subject to the following requirements: “The Commonwealth of Massachusetts . . . command[s] you . . . to make an immediate search. . . . Every officer to whom a warrant to search is issued shall return the same to the court by which it was issued as soon as it has been served and in any event not later than seven days from the date of issuance thereof.” Cromer, 365 Mass. at 520. On December 7, 1971, members of the Boston Police Department conducted a search of the designated premises and returned the search warrant to the issuing court. The officers provided no explanation to justify the seven-day delay in initiating the search.

The Cromer Court concluded:

To summarize, we hold that [the relevant law] requires execution of search warrants within a reasonable time after issuance. Execution of a search warrant which is delayed more than seven days is per se invalid without regard to prejudice. Even if a delay of no more than seven days is shown to be unreasonable, evidence seized pursuant to the warrant need be suppressed only if the defendant sustains the burden of proving legal prejudice attributable to the delay.

Id. Thus, the Court found that initiating a search within the seven-day warrant requirement is not per se reasonable and that there are times when delaying the execution of a search for the full seven days is unreasonable. In those limited instances the court determined that the defendant must demonstrate prejudice in order to obtain suppression of the evidence. The Court made clear, however,

that executing a search after the seven-day time period was per se unreasonable and required no showing of prejudice.

Thus, in relying on Cromer to deny a motion to suppress absent a showing of prejudice, the Ellis court ignored the actual holding in Cromer, which requires a showing of prejudice only when the delay occurred within the time frame designated by the warrant, but was nonetheless unreasonable. Outside that time frame, the Court in Cromer held that prejudice was irrelevant because the search was per se invalid. Thus, the State's reliance on Ellis is misplaced. Indeed, the holding in Cromer is actually consistent with the rule articulated in Brunette, the case upon which this court relied in its original order.

In denying the motion to suppress, the Ellis court also relied on Commonwealth v. Gomes, 408 Mass. 43, 46 (1990), which held that one purpose of excluding evidence obtained in violation of a search warrant was the future deterrence of police misconduct. Specifically, the Ellis court concluded that, where police officers dutifully conduct a search of voluminous and complex computer data and find themselves unable to complete the search within the time frame mandated by the warrant, suppression of the evidence is not warranted because it would not have the effect of deterring police misconduct. In the present case, however, the State was not actively searching the defendant's computer during the lengthy delay. To the contrary, the State failed to begin the search for approximately 18 months, after which the search was completed in just two weeks. Thus, under these facts, the court finds that suppression of the

evidence is appropriate because police inaction caused the search to be unreasonably delayed.

In sum, the court finds distinguishable the cases upon which the State relies in which searches have been untimely due to reasonable delay necessitated by an ongoing search. In those cases short delays in conducting searches were found reasonable given that the searches began immediately and involved voluminous and complex material. Those facts are not present here. In contrast, the search in this case was delayed for a lengthy period of time as a result of the State's failure to begin its search for over 18 months. Though 6,400 images were discovered, there is no evidence that the searches were complex or required more than two weeks to complete. In addition, the State cites to Hernandez, which mistakenly relies upon the Ellis case for the authority that suppression is not a remedy for untimely searches. Finally, the court finds that in this case, suppression of the evidence is appropriate in order to curb delays of this nature in the future.

Accordingly, the State's Motion for Reconsideration is DENIED.

So Ordered.

Date: February 4, 2005

Tina L. Nadeau
Presiding Justice